Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

McGINNIS, INC.,
Petitioner,

v.

DARRELL EDWARD STEVENS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED

1. Whether the court of appeals erred in construing the general maritime law as requiring an employer to pay maintenance and cure to a former employee for a condition which was not caused or aggravated by his employment and did not manifest itself during his service to a vessel.

2. Whether the court of appeals erred in affirming the district court's finding that Plaintiff-Respondent's tumor manifested itself while he was in the service of Defendant-Petitioner's vessel, on the basis of non-specific symptoms recognized only in hindsight.

PARTIES TO THE PROCEEDING

The Petitioner is McGinnis, Inc., which is a wholly owned subsidiary of McNational, Inc. The Respondent is Darrell Edward Stevens.

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A. The correct legal test, long-ago established by this court, and consistently followed in the other circuits, states that a seaman is entitled to maintenance and cure for an injury or

illness only where: 1) the illness or injury was caused or aggravated by the seaman's employment; or 2) the illness or injury manifested itself to the seaman or his physician during his service to the employer's vessel, such that the condition was diagnosed or the seaman sought treatment within the confines of the employment relationship. The majority below departed from the established jurisprudence in finding that Respondent was entitled to maintenance and cure despite failing to satisfy either of the two requirements cited above. 8

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Petitioner, McGinnis, Inc. petitions as follows for a Writ of Certiorari to review the May 7, 1996, Opinion of the United States Court of Appeals for the Sixth Circuit which affirmed the judgment entered by the United States District Court for the Eastern District of Kentucky on August 5, 1994.

OPINIONS BELOW

The judgment of the United States District Court for the Eastern District of Kentucky, entered on August 5, 1994 is not published, and the Opinion of the United States Court of Appeals for the Sixth Circuit entered on May 7, 1996, is reported at 82 F.3d 1353 (6th Cir. 1996).

JURISDICTION

This Petition seeks review of an Opinion entered by the United States Court of Appeals for the Sixth Circuit on May 7, 1996. A Petition for Rehearing filed by Petitioner, McGinnis, Inc., was denied by the United States Court of Appeals for the Sixth Circuit on June 13, 1996.

McGinnis, Inc. seeks to invoke the jurisdiction of this Court to review the Opinion of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This appeal involves the interpretation of the ancient doctrine of maintenance and cure as adopted by the Federal General Maritime Law and does not involve the interpretation of any Constitutional, statutory or regulatory provisions.

STATEMENT OF THE CASE

A. Procedural Posture:

This Petition for Writ of Certiorari ("Petition") arises from a Complaint filed by Plaintiff-Respondent Darrell Edward Stevens (hereinafter "Stevens") on November 23, 1993, in the United States District Court for the Eastern District of Kentucky, seeking payment of maintenance and cure from his employer, Defendant-Petitioner, McGinnis, Inc. (hereinafter "McGinnis,") for a rare paraganglion tumor known as a glomus jugulare tumor, which was first diagnosed five months after Stevens was fired by McGinnis for misconduct. (R. 1, Complaint at ¶8)(R. 62, Order at p. 3). The Complaint also sought damages which allegedly resulted from the unseaworthiness of McGinnis' vessels upon which Stevens worked pursuant to the General Maritime Law and sought damages pursuant to the Jones Act, 46 U.S.C. §688, for damages allegedly resulting from McGinnis' negligence. (R. 1, Complaint at ¶9).

On April 4, 1994, McGinnis filed a Motion for Summary Judgment seeking dismissal of Stevens' claim for maintenance and cure. (R.28, Motion for Summary Judgment) Stevens filed its opposition to McGinnis's Motion for Summary Judgment on April 18, 1994. (R.33 Response to Motion for Summary Judgment) McGinnis filed a Reply Brief in Support of the Motion for Summary Judgment on April 27, 1994. (R.35 Reply Memorandum in Support) On June 13, 1994, the court entered an Order denying McGinnis's Motion for Summary Judgment and granting a motion filed by Stevens on December 15, 1993, (R.7 Motion) ordering a separate trial to the court on the issue of maintenance and cure. (R.42 Order). On July 28, 1994, a trial to the court proceeded on the issue of maintenance and cure with the court taking the matter under advisement at

the close of evidence. (R.61 Civil Trial Minutes [10:00 session] at p.140).[1] On August 5, 1994, the court entered its Order finding in favor of Stevens awarding maintenance and cure. (R.62 Order). On August 25, 1994, McGinnis filed a timely Notice of Appeal from the district court's judgment order on maintenance and cure. (R.66 Notice of Appeal). On September 2, 1994, Stevens filed a Notice of Cross Appeal from the court's final Order of August 5, 1994. (R.70 Notice of Cross Appeal).

On May 7, 1996, the United States Court of Appeals for the Sixth Circuit announced its Decision affirming the judgment of the United States District Court for the Eastern District of Kentucky in a divided decision. The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 82 F.3d 1353 (6th Cir. 1996).

On May 21, 1996, McGinnis petitioned the court for a rehearing pursuant to Rule 40 of the Fed. R. App. P. and made a Suggestion for Rehearing En Banc pursuant to Rule 35(b) of the Fed. R. App. P. On June 13, 1996, the United States Court of Appeals entered an Order denying McGinnis' Petition for Rehearing.

B. Facts:

Respondent Stevens' claim for maintenance and cure arose from a rare paraganglion tumor known as a glomus jugulare tumor, which was found during treatment for an

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1 The transcript of the trial was taken by different court reporters. The first transcript, beginning with page 1, began at the 9:00 a.m. session. After a short recess, the record continues at 10:00 a.m. but again starts at page 1. For clarity, citations to the transcript will designate the 9:00 or 10:00 session.

unrelated illness five months after his employment was terminated. The condition is so rare that according to medical testimony, there have been only approximately 100 reported cases of patients developing this condition. (R.56 Depo. of Dr. Geier, at p.8). The tumor was discovered while Stevens was being treated at a hospital for alcoholism and stomach ulcers. A CT scan was ordered as part of Stevens' treatment. During the reading of the CT scan doctors noticed the tumor in Stevens' neck. (R.53 Depo. of Dr. Deutsch, at p.10). Prior to the inadvertent discovery of the tumor, Stevens made no specific complaints related to the tumor, sought no treatment for pain, discomfort or other symptoms of the tumor, and did not realize the tumor was present. (R.61 Civil Trial Minutes [10:00 session] at pp. 118-120). Stevens' treating physician, Dr. Mark Deutsch, testified typical symptoms for this condition are hoarseness, difficulty swallowing and other cranial nerve deficits. Stevens did not have symptoms of hoarseness or difficulty swallowing and showed no signs of cranial nerve deficits. In fact, according to Dr. Deutsch, the tumor could not be detected even by a physician during clinical examination or palpitation of the neck. Dr. Deutsch testified Stevens was completely asymptomatic and had a normal pre-operative examination immediately prior to surgical excision of the tumor. Only through CT examination was the tumor detected. (R.53 Depo. of Dr. Deutsch at pp.9-10, 11, 30 and 45). Following diagnosis of the glomus jugulare tumor, Stevens was transferred to Veterans Hospital where surgical excision of the tumor was accomplished by Dr. Mark Deutsch and other Veterans Hospital physicians. (R.53 Depo. of Dr. Deutsch at p.8).

At the conclusion of the trial, the court entered judgment in favor of Stevens finding Stevens was entitled to maintenance and cure based upon the court's findings Stevens had "symptoms" related to the tumor while employed with

McGinnis, Inc. As is noted in the court's Judgment and Order, the court found the tumor was not aggravated by his employment and it was undisputed at trial the tumor was not caused by his employment. (R.62 Order at p.3-4).

Stevens testified at trial he had symptoms associated with the tumor and these symptoms consisted of headaches and behavioral changes, which began approximately one and one-half years before his discharge and shortly after he allegedly fell from the towknee of a McGinnis vessel. (R.62 Order at p.2). The medical witnesses called to testify on behalf of Stevens disagreed as to whether these general complaints were related to the tumorous condition. Dr. Poore, a family physician, testified the headaches were a symptom of the tumor. (R.61 Civil Trial Minutes [9:00 session] at p.7). Dr. Martin, a vascular surgeon, testified he could not say whether the headaches were related. (R.61 Civil Trial Minutes [10:00 session] at p.54). The treating physician, Dr. Deutsch and an oncologist called by McGinnis, Dr. Geier, testified that neither headaches nor behavioral changes reported by Stevens were symptoms of the paraganglion tumor. (R.53 Depo. of Dr. Deutsch at p.15; R.56 Depo. of Dr. Geier at pp.13-16).

The medical experts agreed this tumor probably existed in Stevens' neck while he was employed by McGinnis. The medical experts likewise agreed such tumors often exist with no related symptoms and with the patient not realizing the tumor is present.(R.61 Civil Trial Minutes [10:00 session] at p.45; R.53 Depo of Dr. Deutsch at p.10; R.56 Depo. of Dr. Geier at p.9). The experts called by Stevens, Dr. Poore and Dr. Martin, both testified Stevens' change in behavior, which was described as an increase in violent and aggressive behavior, was related to the tumor. (R.61 Civil Trial Minutes [9:00 session and 10:00 session] at pp.27, 43). Both, however, admitted on cross-examination that they were relying on what

Stevens told them about his conduct. Neither was aware of Stevens' history of alcohol abuse, domestic violence and altercations with employees, all of which pre-dated the period Stevens claims the behavioral changes began. (R.61 Civil Trial Minutes [10:00 session] at pp.22, 44, 50 and 54- 55; R.60 Defendant's Exhibit 6, 4-30-93 Psychosocial summary).

Stevens was employed by McGinnis as a deckhand and a pilot from March 15, 1985, until December 8, 1992. (R.62 Order at p.1). During almost eight years of employment, he was rarely absent from work and was never injured sufficiently to require medical treatment. He worked 12 hours on and 12 hours off, always returning to land at the end of his shift. He generally worked 6 days on and 3 off. (R.62 Order at p.1). During his tenure with McGinnis, and before, Stevens was a heavy drinker who had fights with fellow employees and admitted to verbal, emotional and physical abuse of his two ex-wives. (R.61 Civil Trial Minutes [10:00 session] at pp.121-124; R.60 Defendant's Exhibit 6, 4/30/93 Psychosocial summary). Stevens was fired December 8, 1992, for beating a fellow employee and threatening his supervisor with a gun. He had an altercation in 1986 with a fellow employee where he beat that employee sufficiently to require hospital treatment. (R.61 Civil Trial Minutes [10:00 session] at p.83). Stevens underwent at least one physical examination at the request of McGinnis during his employment which did not disclose the existence of the tumor.

In addition, Stevens visited his family physician from time to time complaining of problems associated with colds and sinus problems. (R.61 Civil Trial Minutes [10:00 session] at pp.118-120; R.60 Defendant's Exhibit 8, Dr. Wilson's office notes). At no time during his tenure with McGinnis did Stevens seek medical treatment for headaches or behavioral change, nor was he or any physician who saw him, aware of the

tumor in his neck. The tumor was first detected five months after his termination from McGinnis employment. Prior to its detection during review of a CT scan, Stevens was not aware he had the tumor. (R.61 Civil Trial Minutes l0:00 [session] at pp. 118-120; R.60 Defendant's Exhibit 7, St. Elizabeth Consultation).

A three-judge panel of the United States Court of Appeals for the Sixth Circuit, with one judge dissenting, affirmed the district court decision which held maintenance and cure was properly payable in this case despite the undisputed evidence Stevens did not fall ill or seek medical treatment until five months after his employment was terminated. Stevens v. McGinnis Inc., 82 F.3d 1353 (6th Cir. 1996). The court also affirmed the district court's decision declining to award attorney's fees to Stevens.

ARGUMENT

I **THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW AS TO WHETHER AN ILLNESS MUST BE "MANIFEST" WHILE A SEAMAN IS IN THE SERVICE OF HIS EMPLOYER'S VESSEL IN ORDER FOR THAT SEAMAN TO BE ENTITLED TO MAINTENANCE AND CURE PAYMENTS.**

A. **The correct legal test, long-ago established by this court, and consistently followed in the other circuits, states that a seaman is entitled to maintenance and cure for an injury or illness only where: 1) the illness or injury was caused or aggravated by the seaman's employment; or 2) the illness or injury manifested itself to the seaman or his physician during his service to the employer's vessel, such that the condition was diagnosed or the seaman sought treatment within the confines of the employment relationship. The majority below departed from the established jurisprudence in finding that Respondent was entitled to maintenance and cure despite failing to satisfy either of the two requirements cited above.**

Historically, this court has held that a shipowner/employer has an ancient obligation to care for a seaman who is injured or becomes ill during the course of his voyage on the employer's vessel. Vaughan v. Atkinson, 369 U.S. 527, at 531-532 (1962). This maintenance and cure obligation is owed regardless of the cause of the injury, or the

fault of any party, and continues until the seaman has reached a state of maximum medical cure. Id. at 531, Calmar S.S. Corp. v. Taylor, 303 U.S. 525, at 527-528 (1938).

Although the seaman need not show any fault on the part of his employer, the applicable precedent clearly requires him to show that an injury or illness occurred, was aggravated, or manifested itself during the course of the seaman's employment. Calmar at 530; Nelsen v. Research Corp. of Univ. of Hawaii, 805 F. Supp. 837, 853 (D.C. Hawaii, 1992). Since it was undisputed Stevens' employment at McGinnis neither caused or contributed to his condition, the issue before the district court was whether Stevens' illness manifested itself during the course of his employment with McGinnis. The district court while paying lip service to the manifestation requirement applied an incorrect legal test in determining Stevens' generalized symptoms constituted a manifestation of his tumorous condition. In affirming the district court, the court of appeals opinion entirely jettisoned the manifestation requirement in contradiction of longstanding precedent from this Court and the other circuits. According to the majority:

> The parties fail to realize that the resolution of this case does not depend on the meaning of the verb "to manifest." The word is widely used in this context only because in Taylor, the Supreme Court chose it to help distinguish between illnesses and injuries actually caused by a seaman's employment and those which merely come to be known during his employment. There is no precedent binding on this court that restricts us to resolving this case based on a definition of "to manifest."

Stevens v. McGinnis, Inc., 82 F.3d 1353, 1358 (6th Cir. 1996).

Instead, the majority looked to language in Vaughan indicating that a seaman is entitled to maintenance and cure when he "becomes" sick in the ship's service and interpreted this to mean maintenance and cure is owed to any seaman whose illness "caused symptoms" during his employment. Stevens v. McGinnis, Inc., 82 F.3d 1353 at 1359 (6th Cir. 1996). (citing Vaughan v. Atkinson,369 U.S. at 531(1962)). Under the majority's holding, any generalized "symptom" of an illness, in this case the complaint of headaches, even without an attempt to obtain medical treatment or diagnosis, is enough to trigger the obligation to provide maintenance and cure. This rule subjects the maritime employer to liability for generalized complaints which in hindsight may have been symptomatic of a disease or condition appearing years later. Such a rule is in conflict with the traditional purpose of maintenance and cure and the Rule of Law announced by this Court.

Contrary to the majority's assertion, this Court has, in fact, required a showing of the "manifestation" of an illness while in service of the vessel before maintenance and cure is owed. Vaughan v. Atkinson, 369 U.S. 527 (1962), concerned a seaman who entered the hospital five days after returning from a three month voyage and received treatment for tuberculosis. It is obvious and was undisputed that the defendant shipowner and plaintiff seaman knew, before the end of the voyage and during the employment relationship, that the plaintiff was ill. This is made abundantly clear by the fact that the defendant in Vaughan issued the plaintiff a certificate to receive hospital treatment once the ship docked. Id., 369 U.S. 527, at 528. It is clear, from the fact that the seaman had complained of illness to the employer, and that he sought treatment immediately upon the completion of the voyage, that his illness had "manifested" itself while in the service of the vessel.

Likewise, in Vella v. Ford Motor Co., 421 U.S. 1 (1975), the seaman notified his employer, while being discharged, that he had fallen on the ship. His employer immediately issued him a certificate which permitted him to go to a public hospital. Vella v. Ford Motor Co., 1975 AMC 81, at 82.[2] It was subsequently determined that the seaman's injury was incurable. Reversing the court of appeals' holding that the seaman was not entitled to maintenance and cure because the injury was later found to be incurable, the court held that the obligation of maintenance and cure arises at the time the seaman becomes injured, and continues until that injury has been medically diagnosed as incurable. 421 U.S. 1, 5. It is interesting to note that, despite the fact that the seaman sustained his injury on April 4, 1968, the obligation to pay maintenance and cure did not commence until June 29, 1968, the date on which the seaman first advised his employer of the injury and sought treatment. Id. at 5. "Manifestation" of the seaman's injury in Vella occurred, just as in Vaughan, when the seaman advised his employer and sought medical treatment for his condition.

The Circuit Courts of Appeal have followed this Court in requiring the seaman to show a manifestation of the illness alleged before maintenance and cure is owed. Shaw v. Ohio River Co., 526 F.2d 193 (3rd Cir. 1975) closely resembles the case at bar. Shaw, a cook aboard an Ohio River Co. vessel, left the vessel for her regularly scheduled time off. Id. 526 F.2d at 194. During her time off she went to a doctor for a routine physical examination (not due to any complaint or suspicion of illness). The examination disclosed a breast tumor which had been in existence for some time. Id. Shaw had no symptoms

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[2] These facts are set forth only in the appellate decision which is reported only in American Maritime Cases (AMC).

from this tumor which had caused her to notify her employer and/or doctor and, therefore, there was no manifestation of this illness while she was aboard an Ohio River Co. vessel. The Third Circuit held that because Plaintiff's symptoms manifested themselves while she was not in service of the vessel, there was no manifestation of illness while aboard the vessel and maintenance and cure was not payable. Id. at 198-99.

Selh v. McCormack Lines, Inc., 362 F.2d 541, 542 (2nd Cir. 1966), involved the issue of whether a cancerous tumor manifested itself while the plaintiff was in the service of the ship. Id. at 541. The plaintiff claimed the inhalation of oil fumes while onboard defendant's vessel had aggravated a cancerous condition in his larynx. Id. At trial, he claimed that symptoms of hoarseness and difficulty swallowing food were apparent before he left the vessel on July 31, 1958. However, the defendant produced evidence that he did not seek medical attention until January 1959. Id. at 542. Affirming a jury verdict in favor of defendant, the Second Circuit stated, "(T)he record clearly shows that the evidence submitted presented a question appropriate for the jury's consideration, namely, did the illness manifest itself while plaintiff was in the ship's service." Id.

The seaman in Rowald v. Cargo Carriers, Inc., 243 F.Supp. 629 (E.D. Mo. 1965) was diagnosed with a tumor. However, unlike Respondent Stevens, the seaman in Rowald suffered headaches so severe that he sought treatment for them while still in the service of the vessel. In fact, five days after visiting the doctor, his brain tumor was diagnosed, and eight days after that, surgery was performed. Id. at 630. Based on the fact that the seaman had sought treatment, and been diagnosed for his illness while in the service on the ship, the court held "[W]hile the instant disability of libelant is unrelated to and not caused by his employment, it manifested itself first

while he was employed on a thirty-day off period but still a member of the crew." Id. at 632. It should be remembered that Respondent Stevens never once sought any kind of treatment for his alleged headaches.

In Gauthier v. Crosby Marine Service, Inc, 499 F.Supp. 295 (E.D. La. 1980), it was undisputed that the seaman's heart condition was not caused by the defendant employer. However, since the heart condition was diagnosed during medical testing which took place while plaintiff was still a member of the crew, the court held maintenance and cure benefits were owed, since such benefits become the obligation of the shipowner "with respect to an illness or injury that occurs or manifests itself while the seaman is in the service of the vessel." Id. at 299.

Loverich v. Warner, 118 F.2d 690 (3rd Cir. 1941) (cert. denied, 313 U.S. 577) concerned a seaman who was diagnosed with throat cancer after he left the service of his ship. However, while still a member of the crew, he had complained of severe hoarseness and dizzy spells. He was examined by the company doctor, who diagnosed him with other problems but not cancer. Feeling he was a poor risk to work, the company discharged the seaman. Obviously, the company knew the seaman was ill, and was seeking to escape its maintenance and cure obligation by discharging him. The court held for the seaman, as "plaintiff's illness arose during his employment by respondent," even though it was not caused by such employment. Id. at 692.

"Manifest" has been defined as:

> Evident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden and is synonymous

> with open, clear, visible, unmistakable, indubitable, indisputable, evident and self-evident. Black's Law Dictionary, Fifth Edition.

It has been said that an illness is "manifest" when the injured party "knew or should have known of the existence of his illness because he was experiencing symptoms that would lead a reasonable person to seek a medical diagnosis." Kracht v. Aalfs Associates H.C.P, 905 F.Supp. 604, 614-615 (N.D. Iowa 1995) (citing American Sun Life Ins. Co. v. Remig, 482 So.2d 435, 436 (Fla.Dist.Ct.App. 1985).

Furthermore, this Court has previously defined manifestation in a manner consistent with the definition set forth above. In Urie v. Thompson, 337 U.S. 163 (1949), the plaintiff-employee had been exposed to silica dust during his employment with defendant-railroad, but only became ill from such exposure several years later, when the severity of his ailment required him to seek medical attention. Rejecting defendant's argument that the statute of limitation had tolled from the date plaintiff was first exposed to the silica dust, the Court held "the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves." Id. at 171, citing Associated Indemnity Corp. v. Industrial Accident Commissiion, 124 Cal.App. 378, at 381; 12 P.2d 1075, at 1076 (1932). The Court found that the statute tolled when the illness manifested itself, and manifestation occurred when the symptoms became such that the plaintiff knew something was wrong and sought medical treatment.

The common holding from the above-cited authorities is that the seaman's illness must manifest while in service of the vessel, and an illness has manifested when the plaintiff knows

(or should know) he is ill, and seeks medical attention while in the course and scope of his employment relationship.

In the case at bar, this manifestation requirement was never met. Stevens alleges he experienced headaches, but it is undisputed he suffered from no affliction which caused him to fall ill or seek medical treatment. Never once did he request or require medical attention for his condition. Never once did he leave the boat or miss any work because of these headaches. At no time was McGinnis made aware of any medical problems of Stevens' that could require medical treatment.

Furthermore, it must be remembered that the tumor was discovered only by chance. Stevens had gone to the hospital for treatment of alcoholism and stomach ulcers, not to address any symptoms of the tumor. Had Stevens not undergone treatment for his alcohol abuse, there is no indication of when the tumor might have been discovered. As Judge Wellford correctly observed in his dissent, "maintenance and cure does not apply to an illness, only speculatively and tenuously connected to a seaman's employment, which was first discovered six months after the seaman was terminated due to alcoholism and assaultive behavior." Stevens v. McGinnis, Inc., 82 F.3d 1353 at 1361 (6th Cir. 1996) (Wellford, J. dissenting).

This Court's precedent clearly requires a seaman to show manifestation of an illness. The majority departed from this requirement, and instead allowed a seaman to recover maintenance and cure based solely on complaints of possible symptoms which only in hindsight were alleged to be related to his tumorous condition. The decision by the court of appeals is in conflict with the decisions of this Court and the other circuits, and for this reason, this Court should grant certiorari.

B. **Under the Sixth Circuit's holding, maintenance and cure has been transformed into perpetual health insurance, which is contrary to the historical policies underlying maintenance and cure as stated by this Court and other Circuits.**

In Calmar S.S. Corp. v. Taylor,303 U.S. 525, 527 (1938), the Court wrote:

> whether the seaman is at home or abroad, his right to maintenance and cure may outlast the voyage. The policy underlying the obligation, so cogently stated by Justice Story in Harden v. Gordon, . . . and the liberality with which admiralty courts have traditionally interpreted rules devised for the benefit and protection of seamen who are its wards . . . call for some extension of the duty beyond the term of service. Id. at 529.

This opinion re-affirmed that seamen are considered wards of the court, and that the rules devised for their benefit and protection should be construed liberally.

However, "where the disability arises after he has left the ship, there is ordinarily no right to maintenance and cure." The W.H. Hoodless, 38 F.Supp 432 (E.D. Pa. 1941). This is because "[T]he ship is not an insurer, and is not obligated to provide maintenance and cure beyond a reasonable time." Id. citing The Pochasset, 281 F. 874 (D.R.I 1922); see also Vella v. Ford Motor Co., 421 U.S. 1 (1975).

In Mucha v. United States, 1933 A.M.C. 1427 (E.D. Pa. 1933), after finding that claimant had fallen while aboard the vessel, and over one year later developed back pain which could not be related to that fall, the court found for the defendant, holding that "a ship is not answerable under the cure and maintenance obligation for the physical or mental condition of a member of its crew which developed a year after his discharge." Id.

The flaw in the majority's holding is that it transforms maintenance and cure into perpetual health insurance. Under the law announced below, a former seaman, who becomes ill long after leaving his employment with the shipowner, can recover maintenance and cure benefits so long as he can allege symptoms existed during his employment which, in hindsight, may be similar to the symptoms of his subsequent illness. The seaman need not demonstrate that the condition was serious enough, at the time, to warrant his seeking medical attention and thus, need not prove he "fell ill" or that his illness was manifest.

Under the rule announced below, a heart attack victim can now allege that he felt chest pains while aboard the vessel years before, and recover maintenance and cure for his subsequent heart attack. A stroke patient could relate his condition to a time he once felt dizzy from heat exhaustion while at work. If the illness is a tumor, such as in Stevens' case, the plaintiff need only allege he experienced occasional headaches while on the ship.

The rule announced by the court of appeals unreasonably assumes that every time an individual has a headache, experiences dizziness, or simply feels sick, this is an indication of a more serious health concern. If a condition is, in fact, severe enough to cause illness, the individual should (and most

people would) attempt to seek treatment for it. To hold otherwise places vessel owners in the untenuous position of providing perpetual health insurance to each employee who serves one or more days on its vessel. This ruling contradicts this Court's precedent and compels the granting of this Petition for Certiorari.

II. EVEN UNDER ITS OWN TEST, THE SIXTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S FINDING THAT PLAINTIFF-RESPONDENT'S ILLNESS HAD "MANIFESTED" WHILE HE WAS IN THE SERVICE OF DEFENDANT-PETITIONER'S VESSEL. PLAINTIFF-RESPONDENT'S OWN EVIDENCE CLEARLY ESTABLISHED THAT HIS ILLNESS DID NOT MANIFEST WHILE IN THE SERVICE OF THE VESSEL, AND THE MAJORITY ERRED IN HOLDING THAT THE DISTRICT COURT'S FINDING WAS NOT CLEARLY ERRONEOUS.

The court of appeals reviewed the district court's findings of fact for clear error. Fed. R. Civ. P. 52(a). A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing [court] on the entire evidence is left with the definite and firm conviction that a mistake has been committed. Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 622 (1993)(quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). Reliance by the district court upon findings of fact which are clearly erroneous is an abuse of discretion, requiring reversal. U.S. v. Coleman, 628 F.2d 961 (6th Cir.1980).

As set forth in the preceding argument, the district court applied the wrong legal standard in determining maintenance

and cure was properly payable. Should this Court decline to apply the legal standard set forth in the foregoing argument, however, and accept the district court's view that symptoms, which can in hindsight be connected to an illness, are manifestations of that illness, the district court's findings of fact are still clearly erroneous, requiring reversal of the District Court's Judgment Order.

It was undisputed at trial that Stevens did not become ill during his tenure at McGinnis as a result of the tumorous condition for which he later treated. He sought no medical treatment and was completely unaware of the tumor's presence. (R.62 Order at p.1). Notwithstanding these undisputed facts, the court concluded:

> [Plaintiff] experienced symptoms from the tumor while in the employ of Defendant, and the tumor would have been diagnosed if he had sought medical advice while in the employ of the Defendant.

(R.62 Order at p.7). This finding of fact is clearly erroneous since Stevens underwent a physical examination at the request of his employer and visited his family physician, Dr. Wilson, on several occasions during his employment without any diagnosis of the condition. (R.62 Order at p.1; R. 61 Civil Trial Minutes [9:00 session] at p. 28, 29; R.60 Defendant Exhibit No. 8 Office Notes of Dr. Wilson).

In its findings of fact, the court summarized the expert testimony in this case as follows:

> Additionally, the experts agree that it is possible for the tumor to have been the cause of Stevens' headaches, although they disagree as to the

> likelihood that his headaches were caused by the tumor.

(R.62 Order at p.3) The court concluded, however, Stevens was suffering from symptoms of the tumor while employed by McGinnis. This finding made by the court states in pertinent part:

> The court finds that the plaintiff experienced some symptoms of the tumor while employed by McGinnis, namely, headaches and pressures in the head, and deterioration of his personality. . . Thus, for the reasons stated below [sic], this court finds that the tumor "manifested itself," while in the employ of McGinnis.

(R.62 Order at pp.3-4) Furthermore, the court of appeals seemed convinced of this by the "fact" that Stevens' headaches and erratic behavior ended when the tumor was removed:

> Perhaps the most compelling evidence presented concerning the tumor was how rare this type of tumor actually is. As noted above, only approximately one hundred similar tumors are known to have occurred. It is therefore difficult to know exactly what effects such a tumor could produce. The district court thus had to make a difficult finding based on conflicting evidence regarding a rare tumor. The only undisputed facts were that the tumor existed during Stevens's employment with the company, and that Stevens's symptoms subsided after the tumor was removed. After a review of the record, we are not left with a definite and firm conviction that the district

> court made a mistake. Thus, we conclude that the district court did not clearly err in finding that the tumor caused Stevens's headaches and personality changes from which he suffered during his employment. Stevens v. McGinnis, Inc., 82 F.3d 1353, 1356 (6th Cir. 1996).

What the court of appeals ignored altogether is that the "improvement" in Stevens' condition also coincides with the fact that he was undergoing rehabilitation in an attempt to become sober after years of abusive drinking (at the time the tumor was discovered, Stevens was in the hospital for alcohol rehabilitation.). (R. 53, Depo. of Dr. Deutsch at p. 10).

A thorough reading of the record discloses that Plaintiff's complaints of headaches and personality change could as easily have been attributed to his alcoholism and other related problems as to the tumor. Moreover, as stated above, mere generalized complaints which could in hindsight be related to Stevens' tumorous condition, do not constitute a manifestation of the tumorous condition. The only physician who stated an opinion that Stevens' complaints of headaches were caused by the tumor, was a family practitioner called on behalf of the plaintiff, Dr. Floyd Poore. Dr. Martin, a vascular surgeon also called by plaintiff, testified that he could not say whether headaches would be a cause. (R. 61 Civil Trial Minutes [10:00 session] at p.54). Dr. Martin admitted alcohol abuse and a myriad of other potential causes for headaches could be pointed to in Stevens' case. Both Dr. Geier and Dr. Deutsch, the treating physician, testified the symptoms expected from this type of tumor did not include headaches. (R.61 Civil Trial Minutes [lO:OO session] at pp.54-55). The experts agreed that because the tumor was located in the parapharyngial space and involved the vagus and hypoglossal nerves, expected symptoms would involve hoarseness or

problems with the larynx and swallowing mechanisms. It is undisputed Stevens had none of these symptoms. In addition, each testified that often a tumor such as this will exist with no symptoms and without any outward signs. (R.61 Civil Trial Minutes [l0:00 session] at p.11, 22 45; R.53 Deutsch Depo. at p. 9; R.56 Depo.of Geier at pp.5-12).

Dr. Martin and Dr. Poore testified Stevens' change in personality was a symptom of the tumor. This was based upon the theory the tumor was secreting catecholamines which might affect Stevens'personality in a way which would cause him to become more aggressive. In fact, blood tests done prior to excision of the tumor and obtained by Dr. Deutsch, indicate normal levels of catecholamine. (R.53 Deutsch Depo. at p.14). Dr. Deutsch, Dr. Geier and Dr. Martin agreed that secretion of catecholamines by such a tumor is rare. (R.62 Order at p.3). Dr. Deutsch is the only physician who examined Stevens while the tumor was still present. Dr. Deutsch testified that in his opinion, the tumor was not secreting catecholamines. (R.53 Deutsch Depo. at p. 15). Even if some secretion was occurring, it is doubtful the secretion of catecholamines would cause a deterioration in personality as the court found. (R.56 Geier Depo. at pp.11-12). Stevens produced no evidence which demonstrated that increased levels of catecholamines cause violent behavior, but such evidence would have been rendered moot anyway in light of the fact that his blood contained normal levels. In spite of the clear weight of this evidence, the district court found (and the court of appeals agreed) that the tumor caused Stevens to behave erratically, and this behavior was a "manifestation" of the tumor.

Finally, the physicians who testified stated an opinion that Stevens' change in personality was a symptom of the tumor, conceded that they were unaware Stevens was abusing alcohol and had a history of violent conduct prior to the onset

of personality changes as reported by him. Each of the physicians admitted alcohol abuse can cause mood swings, aggressive behavior and headaches.

A reading of Stevens' evidence clearly indicates that, while working for McGinnis, he 1) had an alcohol problem, 2) experienced headaches, and 3) acted abusively towards his family and co-employees. Stevens' evidence further indicates that several months after leaving McGinnis a tumor was inadvertently discovered in his neck. None of the symptoms that might ordinarily be expected with this kind of tumor were ever alleged by plaintiff. Though it was alleged that tumors of this kind may secrete chemicals into the body which induce violent behavior, plaintiff's evidence showed normal levels of these chemicals in his bloodstream. He never sought treatment for his alleged condition, and it was undisputed that the tumor was in no way caused as a result of Stevens' employment with McGinnis.

Despite all of the above, the district court found that Stevens exhibited symptoms of the tumor while in McGinnis' employ, and the court of appeals affirmed. As those findings of fact were clearly erroneous, this Court should grant certiorari on this issue.

CONCLUSION

For the foregoing reasons, Petitioner McGinnis, Inc. requests that this Court grant certiorari in the above-captioned matter.

Respectfully submitted,

/s/

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APPENDIX A

Eastern District of Kentucky
FILED
August 5, 1994
At Covington
Leslie G. Whitmer
Clerk, U. S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 93-189

DARRELL EDWARD STEVENS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
McGINNIS, INC.,	)	
	)	
Defendant.	)	

Darrell Stevens brings this suit under the Jones Act, seeking damages and maintenance and cure. The maintenance and cure claim was severed and tried before this court without a jury on July 28, 1994. Pursuant to Fed. R. Civ. P. 52, the court renders the following findings of fact and conclusions of law.

FINDINGS OF FACT

McGinnis, Inc. (hereinafter "McGinnis") operates towboats and barges upon the Ohio River. From 1985 to 1992, Darrell Stevens was employed by McGinnis aboard their vessels, working first as a deckhand and later as a pilot, though he was not assigned to any particular vessel. While employed with McGinnis, Stevens was supervised by Michael Carey and worked occasionally with Steve Buching. Although his work schedule varied, Stevens normally worked a twelve-hour shift for six consecutive days followed by three days off.

It is undisputed that, during his employment with McGinnis, Stevens had an undetected tumor located at the right base of his skull. It is also undisputed that a physical examination during the term of employment would have revealed the tumor. However, the parties dispute whether this tumor "manifested itself" during Steven's employment with McGinnis.

Allegedly in March 1991, Stevens fell while working on a boat, striking the steel deck with the back of his head and neck; the same area where his tumor was located. Although Stevens reported his fall to Carey, Stevens refused medical assistance other than some aspirin, and Care did not complete an accident report on the incident.

Some time after his fall, Stevens began to experience headaches. Additionally, both Stevens and Carey assert that Stevens experienced a personality change exhibited by Stevens' increasingly sour disposition toward others, although Buching testified that he did not detect any change in Stevens' personality. It is undisputed that during Stevens' employment with McGinnis, he drank alcohol and occasionally had altercations with his co-employees, both before and after his

fall. However, Carey testified that after Stevens' fall, Stevens continually complained to Carey about his headaches and co-employees. (Doc #54, Dep. Carey, p. 80). On December 8, 1992, both Stevens and Carey were fired.

Five months after he was fired, Stevens was admitted to St. Elizabeth Hospital for treatment of alcoholism and stomach ulcers. During a CAT scan, Stevens' tumor was revealed. Eventually, a baseball size glomus jugulare tumor, approximately six centimeters by five centimeters, was removed from his right neck and skull area. (Doc #53, Dep. Of Dr. Deutsch, pp. 30-36). After the tumor was excised, Stevens' headaches disappeared and his disposition towards others improved.

Stevens contends that, while he as employed with McGinnis, the tumor manifested itself through his chronic headaches and his personality change. The medical experts agree that Stevens' tumor, a glomus jugulare tumor, is an extremely rare type. Additionally, the experts agree that it is possible for the tumor to have been the cause of Stevens' headaches, although they disagree as to the likelihood that his headaches were caused by the tumor. (Doc #50, Dep. Of Dr. Poore, pp. 17-23); (Doc #53, Dep. Of Dr. Deutsch, pp. 40-42); (Doc #56, Dep. Of Dr. Grier, pp. 12-17); (Doc #59, Dep. Of Dr. Martin, pp. 25-29). The experts further disagree as to whether the trauma sustained from Stevens' alleged fall on the boat aggravated the tumor and caused a release of hormones, which caused Stevens' alleged personality change. *Id.*

During the trial, the parties stipulated that the appropriate amount of maintenance in this case is $20 per day. Moreover, for the purposes of this trial, the parties agreed that Stevens' tumor was caused by his employment with McGinnis.

The court finds that the plaintiff experienced some symptoms of the tumor while employed by McGinnis, namely, headaches and pressures in the head, and deterioration of his personality, although the tumor was not diagnosed until after the employment was terminated. Thus, for the reasons stated below, this court finds that the tumor "manifested itself," while in the employ of McGinnis. However, the court expresses no view as to whether the fall aggravated the effects of the tumor.

CONCLUSIONS OF LAW

The right to maintenance and cure invoked by the plaintiff in this case is of ancient origin. As stated in 2 Martin J. Norris, *The Law of Seamen* §§ 26:1 to 26:2 (4th Ed. 1985 & Supp. 1994) [hereinafter "*Law of Seamen*"][1]:

> "For centuries the seaman's right to maintenance and cure when sick or injured in the service of the vessel without willful misbehavior on his part, has been recognized by the general maritime law. It has been perhaps the only remedy upon which the seaman could rely to give him succor in his hour of need. Maintenance and cure, a remedy without the defeating rules of contributory negligence, assumption of risk, the fellow-servant rule of the common law, fault, etc., is to the seaman a simple and certain measure of compensation when he finds himself temporarily or permanently incapacitated. Maintenance and cure as a working man's remedy anticipated industrial workmen's compensation by a thousand years. Mistakenly or otherwise, it is understandable

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[1] See also *Law of Seamen* §§ 26:3 to 26:4 for text of laws dating from the Middle Ages.

why seamen through their unions have fought valiantly to retain their right to maintenance and cure as well as rights under the Jones Act and other remedial statutes) in preference to any form of compulsory compensation.

*****

"Maintenance and cure -- a right given by the general maritime law in consequence of the seaman's status resulting from any shipping contract between the seaman and the master or the vessel -- gives to the seaman, ill or injured in the service of the ship without willful misbehavior on his part, wages to the end of the voyage and subsistence, lodging and care to the point where the maximum cure attainable has been reached."

As recounted in *Law of Seamen*, the doctrine of maintenance and cure was originally designed to prevent the captain of an oceangoing vessel from stranding ashore a seaman who was injured or became ill while in the service of the ship. *Id.* at §§ 26:3 to 26:8.

The concept of the right to maintenance and cure arising when one becomes ill in the service of the ship is difficult of application in cases where, as in the case at bar, a seaman alternates daily back and forth between the vessel and shore, rather than engaging in a long voyage. In the landmark case *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943), the Supreme Court of the United States held that a seaman on shore leave was to be considered in the service of the ship, because some recreation by the seaman is necessary for the efficient operation of the ship. In the *Law of Seamen*, Norris discusses this concept, pointing out that "being in the ship's service has received a rather liberal interpretation." *Law of Seamen* at § 26:23. Discoursing further on the *Aguilar* case, Norris states:

> "Since the Aguilar Case, a liberal interpretation of 'in the service of the ship' has been applied. A number of cases have been decided wherein awards of wages and maintenance and cure have been granted to seamen ill or injured ashore while in the pursuance of their own relaxation and pleasures.
>
> "The effect of the Aguilar decision has been to expand and elasticize the meaning and extent of the phrase 'in the service of the ship' so that at the present time it virtually encompasses all of the seaman's activity from the time he first boards the vessel to the time that he departs from her after signing off, and perhaps, for a reasonable time thereafter should any illness manifest itself traceable to his activities while in the ship's service. The personal nature of the seaman's activity at the moment of illness or injury is not the determining factor in deciding his right to an award. What may defeat it is his own willful misbehavior."

Id. (footnotes omitted).

In its argument against an award of maintenance and cure for Stevens, the Defendant cites the case of *Shaw v. Ohio River Co.*, 526 F.2d 193 (3rd Cir. 1975) wherein a female crew member, who worked thirty days on and thirty days off on a linehaul river boat, was diagnosed with a breast tumor during her thirty-day off period. That court held that she was not in the service of the ship at the time the injury manifested itself.

This court holds that *Shaw* is not in accord with the modern doctrine of maintenance and cure as discussed in *Law of Seamen, supra.* Nor, as is obvious, is *Shaw* analogous on its facts with the case at bar. A member of the crew in a linehaul boat has at least a substantial period where he or she is absent

from the ship and perhaps not subject to recall. This is not the case with the plaintiff in the instant action. On average, Stevens worked twelve-hour shifts for six consecutive days followed by three days off. This court holds that he was generally in the service of the vessel (or fleet of vessels) at all times in this situation. Thus, this situation is analogous to the seaman discussed by Norris, who went home to take a shower during his lunch period.[2]

This court believes that a more enlightened application of the doctrine of maintenance and cure is to be found in *George v. Chesapeake & Ohio Ry. Co.*, 348 F. Supp. 283, 287 (E.D. Va. 1972). The plaintiff in *George* was a commuter-type seaman similar to the plaintiff in the instant case. In *George*, it was held that the seaman who was diagnosed with a slow developing cancer after he left employment with the company, was entitled to maintenance and cure.

> "Since [the seaman] no longer remains in the ship's service once he leaves the vessel, in order to bring himself within the protection of maintenance and cure his cancer must have either 'occurred, been aggravated, or manifested itself while he was on board his vessel.' The application of this test is complicated by the fact that the plaintiff's maladies are merely manifestations of a slow and insidious disease from which he apparently has been suffering for 15 years. This is not the case of some traumatic accident which originates at an identifiable point in time or an illness whose first manifestation is disabling. There is grave doubt as to the exact time the cancer commenced, as well as doubt concerning the location where it first

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[2] *Law of Seamen*, p. 60.

> manifested itself, but it may be said with certainty that the disease originated, progressed, and previously manifested itself while [the seaman] was employed as a seaman for [the defendant]. Obviously, this malignancy was present during his daily periods of being in the service of the ship and, therefore, [the seaman] is entitled to maintenance and cure."

Id. (emphasis added); see also *Petition of the United States*, 303 F. Supp. 1282, 1311 (E.D.N.C. 1969), *aff'd* 432 F.2d 1357 (4th Cir. 1970).

This court notes that the *George* court gave no weight to the fact that the plaintiff therein left the ship while on duty to seek medical advice. Hence, this court holds that the significant fact is that the plaintiff here experienced symptoms from the tumor while in the employ of the defendant, and the tumor would have been diagnosed if he had sought medical advice while in the employ of the defendant. Cf. *Gauthier v. Crosby Marine Service, Inc.*, 499 F. Supp. 295, 299 (E.D. La. 1980), *reconsidered*, 536 F. Supp. 269 (1982), *aff'd*, 752 F.2d 1085 (5th Cir. 1985); *Rowald v. Cargo Carriers, Inc.*, 243 F. Supp. 629 (D. Mo. 1965).

This court also finds that the plaintiff has not reached maximum cure in that he is receiving medical advice advocating further surgery or other treatment.

This court further finds that, since the law in this situation was not clearly established, the defendant is not liable for punitive damages or attorney's fees.

The court understands why the defendant is upset at having to pay for a condition that is not work-related. It must be recalled, however, that the maintenance and cure is a limited

remedy. Lost wages are only partially recoverable. Permanent disability benefits are not recoverable. On the other hand, it applies to non-work-related illness. Therefore, defendant must accept the bitter with the sweet.

As the court has stated on many occasions, a workmen's compensation system would be better for the river trade, both for the employer and the employee. Such is not the law, however.

Therefore, the court being advised,

IT IS ORDERED AND ADJUDGED as follows:

1. That the plaintiff, Darrell Stevens, is entitled to maintenance and cure at the stipulated rate of $20.00 per day from the time his employment was terminated;

2. That the plaintiff, Darrell Stevens, is entitled to medical expenses for the treatment of his tumor (subject to the laws of reimbursement by insurance or otherwise) during the same period;

3. That plaintiff, Darrell Stevens, shall recover nothing by way of punitive damages or attorney's fees.

This 5th day of August, 1994.

WILLIAM O. BERTELSMAN,
CHIEF JUDGE

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0134P (6th Cir.)

Nos. 94-6091/6404

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Darrell Edward Stevens, Plaintiff-Appellee, Cross-Appellant,	)	
v.	)	ON APPEAL from the United States District Court for the Eastern District of Kentucky
McGINNIS, INC., Defendant-Appellant, Cross-Appellee.	)	

Decided and Filed May 7, 1996

BEFORE: BROWN, WELLFORD, and MILBURN, Circuit Judges.

BROWN, J., delivered the opinion of the court, in which MILBURN, J., joined. WELLFORD, J. (pp. 15-18), delivered a separate dissenting opinion.

BAILEY BROWN, Circuit Judge. In this maritime common law case, Stevens, formerly a towboat deckhand and pilot, sued McGinnis, Inc. ("the company"), his former employer, for maintenance and cure resulting from the removal of a tumor which afflicted him during his employment with the company.[1] After a bench trial the district court found that the tumor caused certain symptoms, *e.g.*, headaches and personality changes, from which Stevens suffered during his employment, and thus that the tumor manifested itself during Stevens's service to the company. The district court therefore awarded maintenance and cure to Stevens. The company appeals the district court's judgment. Stevens cross-appeals the court's refusal to award him attorney's fees. For the reasons set forth below, we AFFIRM the district court's judgment.

I. FACTS

The company, which operates barges and towboats on the Ohio River, employed Stevens, first as a deckhand and later

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[1] Stevens originally filed this suit seeking maintenance and cure under maritime common law and damages under the Jones Act, 46 U.S.C. app. § 688 (1988). The district court severed the maintenance and cure claim from the Jones Act claim. Only the maintenance and cure claim is before this court.

as a pilot, from 1985 until 1992. Stevens's years with the company were marred by alcoholism and occasional fighting with coworkers. He was, however, a generally agreeable worker prior to March of 1991. At that time, Stevens fell on the deck of a towboat and suffered a blow to the head and neck. He reported the fall to his supervisor, but did not seek medical attention. After the fall, Stevens began complaining of headaches. Throughout the next year and a half, the headaches grew so frequent that Stevens "complained continuously," according to his supervisor, Michael Carey. Moreover, Carey testified that Stevens's personality changed after his fall. While he was admittedly a quick-tempered and occasionally violent man before he fell, after the fall Stevens had considerable difficulty relating to his fellow employees and handling even minor job-related problems. Stevens's headaches grew severe and his disposition even poorer. In Carey's words, "it was like dealing with just a different person."

Stevens's employment problems culminated on December 8, 1992, when he fought with another employee and allegedly threatened Carey with a gun (Stevens denies that he threatened Carey). The company fired both Stevens and Carey on that day.

Five months later, Stevens entered a hospital seeking treatment for alcoholism and stomach ulcers. While in the hospital, Stevens underwent a CAT scan which revealed a baseball-sized glomus vagale tumor in his neck below his right ear. A glomus vagale tumor is a very rare, noncancerous type of glomus jugulare tumor (also known as a paraganglioma) which occurs in the head and neck. This particular type of

tumor occurs so infrequently that there are only approximately one hundred reported cases of them in medical literature. In June of 1993, a surgeon, Dr. Deutsch, removed the tumor from Stevens's neck. Thereafter, Stevens's headaches subsided and his personality improved. Accordingly to his family physician, Dr. Poore, Stevens became "a model citizen" after his surgery and recuperation. The company argues, however, that Stevens's improved condition also corresponded with an apparently successful treatment for alcoholism.

After the surgery, Stevens, who is characterized by his attorney as a "homeless pauper" who is "completely penniless," requested that the company provide him maintenance and cure payments to help defray his living expenses and the costs of his surgery and recuperation. The company refused, and Stevens filed this suit.

After a bench trial, the district court found, as a matter of fact, that the tumor caused Stevens's headaches and personality changes.[2] The court thus concluded that the tumor "manifested itself" during Stevens's employment with the company. Therefore, the district court ordered the company to pay maintenance to Stevens beginning on the day of the termination of this employment through the point at which he reaches maximum cure, in the amount of twenty dollars per day. Moreover, the court ordered the company to pay the "medical expenses for the treatment of his tumor . . . during the same period." The court held, however, that "since the law in this situation was not clearly established, the [company] is not

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[2] The district court, however, specifically refused to make a finding regarding whether Stevens's fall affected the tumor.

liable for . . . attorney's fees."

The company appeals the judgment of the district court, claiming that the court's findings of fact were clearly erroneous, and that it erred in holding that maritime common law requires it to pay maintenance and cure to Stevens. Steven cross-appeals, claiming he is entitled to attorney's fees.

II. ANALYSIS

A. The district court's factual findings are not clearly erroneous.

We review a district court's findings of fact for clear error. Fed. R. Civ. P. 52(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing [court] on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2279 (1993) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

At trial, the district court considered the testimony of four physicians; two called by each side. Predictably, the two doctors Stevens called, Dr. Poore (Stevens's family physician) and Dr. Martin, testified that the tumor probably caused the headaches and personality problems Stevens endured between his fall and his surgery. The company's physicians, Dr. Deutsch (who actually removed the tumor) and Dr. Geier, testified that it was unlikely that the tumor caused Stevens's problems. Without going into detail regarding the scientific testimony, suffice it to say that the experts on both sides

offered scientific rationale tending to support their conclusions, and that one cannot satisfactorily reconcile the differing opinions.

Perhaps the most compelling evidence presented concerning the tumor was how rare this type of tumor actually is. As noted above, only approximately one hundred similar tumors are known to have occurred. It is therefore difficult to know exactly what effects such a tumor could produce. The district court thus had to make a difficult finding based on conflicting evidence regarding a rare tumor. The only undisputed facts were that the tumor existed during Stevens's employment with the company, and that Stevens's symptoms subsided after the tumor was removed.[3] After a review of the record, we are not left "with a definite and firm conviction" that the district court made a mistake. Thus, we conclude that the district court did not clearly err in finding that the tumor caused Stevens's headaches and personality changes from which he suffered during his employment. Cf. *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 109 (1959) (holding that a jury may draw an inference as to the cause of an illness despite the lack of unanimity among experts as to the cause).

B. The company must provide maintenance and cure to Stevens.

Assuming the district court's factual conclusions to be correct, whether the doctrine of maintenance and cure is broad enough to include Stevens's claim is a legal question, and thus

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[3] As indicated above, however, the company argues that the symptoms subsided because Stevens had quit drinking.

we review it *de novo*. *United States v. Spinelle*, 41 F.3d 1056, 1057-58 (6th Cir. 1994).

I. Maintenance and Cure Law

In *Blainey v. American Steamship Co.*, 990 F.2d 885 (6th Cir.), *cert. denied*, 114 S. Ct. 346 (1993), we provided the following basic synopsis of maintenance and cure law:

> Rather than relying upon the protection of workers' compensation statutes, seamen who suffer illness or injury on the job look to a unique package of remedies. Due to "historical tradition and the realization that seamen are required to endure special perils and hardships," federal common law of the sea accords seamen special relief not available to other workers, including maintenance [and] cure .... Thomas J. Schoenbaum, *Admiralty and Maritime Laws* § 5-1 (1987). Maintenance refers to a shipowner's obligation to provide a mariner with food and lodging if he becomes injured or falls ill while in service of the ship, while cure alludes to the duty to provide necessary medical care and attention. See *Al-Zawakari v. American S.S. Co.*, 871 F.2d 585, 586 n.1 (6th Cir. 1989). A shipowner is liable to pay maintenance and cure to the point of maximum cure, that is, when the seaman's affliction is cured or declared to be permanent. See *Farrell v. United States*, 336 U.S. 511, 517-19 (1949).

Blainey, 990 F.2d at 886-87.

The shipowner's obligation to pay maintenance and cure stems from two basic policy concerns recognized by maritime law for hundreds of years. See Martin J. Norris, *The Law of Seamen* § 26:4 (1985) (stating that the roots of the obligation to pay maintenance and cure are found in medieval sea codes). These two policy concerns are (1) the well-being of seamen aboard ship and in foreign ports, and (2) the importance of a capable merchant marine to the economic and military security of a nation. Justice Story, sitting as a circuit judge, once stated the concerns underlying maintenance and cure as follows:

> Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and achquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made form them in sickness at the expense of the ship, they must oftgen in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. . . . If [the costs of maintenance and cure] are a charge upon the ship, the interest of the owner will be immediately connected with that of the seaman. The master will watch over their health with vigilance and fidelity. He will take the best methods, as well as to prevent diseases, as to insure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate. . . . Beyond this, is the great public policy of preserving this important class of citizens for the commercial service and maritime defence of the nation. . . . Even the merchant

> himself derives an ultimate benefit from what may seem at first an onerous charge. It encourages seamen to engage in perilous voyages with more promptitude and at lower wages.

Harden v. Gordon, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (No. 6,047); see also *Vella v. Ford Motor Co.*, 421 U.S. 1, 3-4 (1975) (stating that the duty to pay maintenance and cure encourages maritime commerce and assures the well-being of seamen).

Over the years, the courts have broadened the duty to pay maintenance and cure. It is now well-settled that maintenance and cure is payable even though the shipowner is not at fault, and regardless of whether the seaman's employment caused the injury or illness. *Calmar S.S. Corp. V. Taylor*, 303 U.S. 525, 527 (1938). In *Taylor*, the Supreme Court established that the duty to pay maintenance and cure does not necessarily end with the voyage on which the seaman falls ill, but can continue beyond that voyage. The Court wrote that

> whether the seaman is at home or abroad, his right to maintenance and cure may outlast the voyage. The policy underlying the obligation, so cogently stated by Justice Story in *Harden v. Gordon*, . . . and the liberality with which admiralty courts have traditionally interpreted rules devised for the benefit and protection of seamen who are its wards . . . call for some extension of the duty beyond the term of service.

Id. at 529. The Court determined, however, that, in cases

where the seaman suffers from a disease "which *manifests* itself during his employment, but is not caused by it," the shipowner's duty is to expend such funds as are necessary only to put the seaman in such condition "as reasonably may be expected to result from nursing, care, and medical treatment." *Id.* at 530 (emphasis added). Thus, the shipowner is not required to support the ill seaman for the rest of his life.[4]

The *Taylor* opinion had a major impact on maintenance and cure law. Beyond its actual holding, the opinion reaffirmed that seamen are considered wards of the court, and that the rules devised for their "benefit and protection" should be construed liberally. Also, it added the term "manifests itself" to the maintenance and cure lexicon, so that the following rule is often repeated: A shipowner must pay maintenance and cure for any illness or injury which occurred, was aggravated, or *manifested itself* while the seaman was in the ship's service. Norris, *supra*, at § 26:21.

Since *Taylor*, the Supreme Court has heard four maintenance and cure cases: *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 737 (1943) (holding that a seaman is entitled to maintenance and cure even if he falls ill or is injured while ashore, as long as he is subject to the call of duty); *Farrell v. United States*, 336 U.S. 511, 517 (1949) (holding that a seaman who overstays his shore leave and injures himself through his own negligence is entitled to a reasonable period of maintenance and cure, but not to maintenance and cure for

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[4] The Court expressly reserved, however, the question of the shipowner's duty where the seaman is injured or made ill as a result of his employment. *Taylor*, 303 U.S. at 530.

life); *Vaughan v. Atkinson,* 369 U.S. 527, 533 (1962) (holding (1) that a sick seaman who is forced to work because his former employer refuses to pay maintenance and cure is not required to set off his earnings against a maintenance and cure award, and 92) that the seaman may recover attorney's fees as damages when the former employer unreasonably refuses to pay maintenance and cure); and *Vella v. Ford Motor Co.*, 421 U.S. 1, 4 (1975) (reversing this court and holding that an injured seaman shall recover maintenance and cure until his injury is declared permanent , not just until it becomes permanent). In each case, the Court refused the opportunity to restrict the scope of maintenance and cure liability. In fact, in all four cases, the Court commented on the "breadth and inclusiveness of the shipowner's duty." *Vella*, 421 U.S. at 4 ("[T]he breadth and inclusiveness of the shipowner's duty assure its easy and ready administration for '[i]t has few exceptions or conditions to stir contentions, cause delays, and invite litigations.'" (quoting *Farrell,* 336 U.S. at 516)); *Aguilar*, 318 U.S. at 730-31 ("So broad is the shipowner's obligation, that negligence or acts short of culpable misconduct on the seaman's part will not relieve him of the responsibility."); *Farrell*, 336 U.S. at 516 ("it has been the merit of the seaman's right to maintenance and cure that it is so inclusive as to be relatively simple, and can be understood and administered without technical considerations."); *Vaughan*, 369 U.S. at 532 ("[T]he shipowner's liability for maintenance and cure [is] among 'the most pervasive' of all and . . . it [is] not to be defeated by restrictive distinctions nor 'narrowly confined.' [*Aguilar*, 318 U.S. at 735]. When there are ambiguities or doubts, they are resolved in favor of the seaman.").

When one reviews the body of maintenance and cure

law in this country, including the Supreme Court cases discussed *supra* and the numerous circuit court and district court decisions on the topic (some of which are discussed *infra*), it becomes apparent that the courts have not yet defined any distinct bounds to the shipowner's duty to provide maintenance and cure. Nonetheless, in the case before us, the company asks us to decide that the district court went too far when it awarded maintenance and cure to Stevens.

2. This Case

The company argues that, even assuming the tumor caused Stevens's headaches and personality changes, we should reverse the district court's award of maintenance and cure. The company asserts that the tumor did not actually become "manifest" until it was discovered through the CAT scan five months after the company fired Stevens. Stevens, on the other hand, contends that the tumor "manifested itself," through the headaches and personality changes, while he was in the service of the ship, *i.e.*, during his employment with the company. The parties primarily argue about meaning of the verb "to manifest" as it is used in the cases and treatises. This argument is largely wasted. The parties fail to realize that the resolution of this case does not depend on the meaning of the verb "to manifest." The word is widely used in this context only because in *Taylor*, the Supreme Court chose it to help distinguish between illnesses and injuries actually caused by a seaman's employment and those which merely come to be known during his employment. There is no precedent binding on this court that restricts us to resolving this case based on a definition of "to manifest."

The real question facing us is: Must the company pay maintenance and cure only when a seaman's illness is diagnosed during his employment, or must the company pay maintenance and cure to any seaman whose illness caused symptoms during his employment, even if the illness is not diagnosed until after the seaman's employment terminates? Neither the Supreme Court nor this court has ever directly addressed this question. In *Vaughan v. Atkinson*, however, the Supreme Court stated that "[m]aintenance and cure is designed to provide a seaman with food and lodging when he *becomes* sick or injured in the ship's service." 369 U.S. at 531 (emphasis added). There is no mention of manifestation at all.

That opinion provides us with guidance. As noted above, the Court granted *certiorari* in *Vaughan* to determine whether the seaman was entitled to attorney fees, and whether the shipowner could set off wages that the seaman earned while sick against maintenance payments. In *Vaughan*, the seaman entered a hospital five days after the end of his employment with the shipowner. The hospital treated him for tuberculosis. *Id.* at 528. After nearly two months, the hospital discharged the seaman, who then spent two years in outpatient status. Eventually, two years and five months after his voyage ended, the seaman was declared fit for duty. *Id.*

During his two years of recuperation, the seaman attempted to recover maintenance and cure from his former employer. The employer questioned the seaman's supervisors and determined that the seaman had not complained of any illness during his service aboard ship. *Id.* The employer therefore repeatedly denied the seaman's claims for maintenance and cure. *Id.* The seaman did not recover

maintenance and cure until, after a trial, the district court ordered the shipowner to pay it. *Vaughan v. Atkinson*, 200 F. Supp. 802, 803 (E.D. va. 1960). The court, however, denied the seaman's claim for attorney's fees. *Id.* at 804. After the Fourth Circuit affirmed the judgment, *Vaughan v. Atkinson*, 291 F.2d at 813, 815 (4th Cir. 1961), the Supreme Court heard the case and determined that the seaman was indeed entitled to attorney's fees. 369 U.S. at 533. In reaching its decision, the Court noted that maintenance and cure "was plainly owed [the seaman] under the laws that are centuries old." *Id.* at 531.

While this language from *Vaughan* is arguably *dicta* since the Court granted *certiorari* to determine whether the seaman was entitled to attorney's fees, not whether he was entitled to maintenance and cure, it nonetheless persuades us to affirm the district court in this case. The *Vaughan* Court obviously believed that the seaman was entitled to maintenance and cure. Stevens, like the seaman in *Vaughan*, entered a hospital after his employment had ended. As in *Vaughan*, it is clear that Stevens became ill while "in the service of his ship." Moreover, unlike the seaman in *Vaughan*, Stevens actually did complain of his illness, *i.e.*, the headaches, during his employment. The only relevant distinction between the two cases is that Stevens was diagnosed five months after his employment terminated, rather than five days. We do not believe, however, that this difference compels a different result. In both cases, the seaman was afflicted while "in the service of his ship." That Stevens was remiss in seeking treatment does not scuttle his claim. Thus, based on *Vaughan*, we hold that Stevens is entitled to receive maintenance and cure until he

reaches maximum cure.[5]

C. Denying attorney's fees was not an abuse of discretion.

We review a district court's decision regarding whether to award attorney's fees in admiralty cases for an abuse of discretion. *Breese v. AWI, Inc.*, 823 F.2d 100, 103 (5th Cir. 1987) (cited with approval in *Al-Zawkari v. American S.S. Co.*, 871 F.2d 585, 590 n.8 (6th Cir. 1989)). "An abuse of discretion exists when the district court applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *First Technology Safety Sys. v. Depinet*, 11 F.3d 641, 647 (6th Cir. 1993). The standard for awarding attorney's fees in maintenance and cure cases derives

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[5] The *Vaughan* opinion also supports the several cases in which courts have awarded maintenance and cure based solely on the presence of an insidious disease during a seaman's employment. *E.g. Petition of the United States*, 303 F. Supp. 1282, 1311 (E.D.N.C. 1969) ("Clearly the claim for maintenance and cure is valid even though the lung cancer may not have manifested itself while in the service of the ship. Obviously [the seaman] had the malignancy while aboard the [ship]."), *aff'd*, 432 F.2d 1357 (4th Cir. 1970); *George v. Chesapeake & O. Ry.*, 348 F. Supp. 283, 287 (E.D. Va. 1972) ("Obviously this malignancy was present during his daily periods of being in the service of his ship and, therefore, [the seaman] is entitled to maintenance and cure."). We need not go quite so far, however, because in this case the district court found that Stevens suffered from symptoms of the tumor while employed by the company. Unlike the seamen in *Vaughan*, *Petition of the United States*, and *George*, Stevens did complain of illness during his employment. Thus, we need not decide the question of whether the mere existence of an insidious disease during a seaman's voyage entitles him to maintenance and cure from the shipowner, no matter how long it takes for the seaman to discover the disease.

from *Vaughan v. Atkinson*, 369 U.S. at 530-31. In *Vaughan*, the Supreme Court awarded attorney fees after concluding that the shipowner was "callous" and recalcitrant in its "willful and persistent" refusal to pay maintenance and cure which was "plainly owed." *Id.*; see also *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1118 (5th Cir. 1984) (same standard) (cited with approval in *Al-Zawkari*, 871 F.2d at 590 n.8 (6th Cir. 1989)).

Thus, the first step in deciding whether the seaman is entitled to attorney's fees requires us to determine whether maintenance and cure was plainly owed. The district court denied attorney's fees because it found that existing law did not clearly establish liability in this case. Thus, the court determined that the company had a reasonable defense to Stevens's claim, and therefore "did not act callously or with indifference to the seaman's plight" in denying it.

Given the similarities we find between this case and *Vaughan*, we are tempted to reverse the district court on this point. We note, however, that the district court found that liability was not clearly defined. Because the portions of the *Vaughan* opinion on which we rely are arguably *dicta*, and because that opinion's relevance completely escaped the parties, we hold that liability for maintenance and cure in this case was not so clear that the district court abused its discretion in denying attorney's fees.

III. CONCLUSION

We AFFIRM the district court's judgment.

HARRY W. WELLFORD, Circuit Judge, dissenting. Noting a paucity of information about the rare condition known as a glomus jugulare tumor and a conflict among the testifying experts as to whether Stevens' tumor caused his alleged headaches and personality change, the majority holds that the district court reasonably found that plaintiff established that those problems were attributable to the tumor. Unlike the majority, I am left "with a definite and firm conviction" that the district court's factual finding on this issue was erroneous. Therefore, I respectfully dissent and would reverse the award of maintenance and cure in this case.

In my view, there are two problems with the district court's finding. First, there is very little in the record, beyond Stevens' own self-serving allegations, tending to prove that Stevens actually experienced the severe headaches and personality change now alleged to be attributable to the tumor. Stevens' experts concede that his tumor could have existed asymptomatically. Although those same doctors testified that Stevens experienced headaches and a personality change, their assessment of his physical condition was based solely on information provided by Stevens. Additionally, prior to this lawsuit, the only indication that Stevens ever complained of such maladies to McGinnis or to his fellow employees was the testimony of Michael Carey, a co-worker who was fired by McGinnis on the same day as Stevens.[1] Furthermore, Stevens failed to make reference to any "personality change" in an

[1] Carey admitted that he failed to inform McGinnis of several violent episodes involving Stevens in 1991 and 1992. He further testified that he did not know that Stevens had or was treated for an alcohol abuse problem.

April 18, 1994 affidavit concerning his employment with McGinnis. Finally, Stevens did not indicate to any of the various doctors involved in his 1993 treatment for alcoholism and stomach ulcers that he was suffering from persistent headaches or behavioral changes. This is confirmed by the reports of Dr. James Linne, Dr. Daniel Barkdoll and therapist Tom Volker.

Even if Stevens did experience these problems, the proof is strong that they were caused by his alcohol abuse, not the tumor. Stevens, part of a family afflicted by alcoholism, has a long history of heavy alcohol abuse which began at age sixteen and continued until he began spitting up blood and sought treatment in 1993. At that time, Stevens reported that his alcohol abuse had destroyed both of his marriages and caused him to lose his job with McGinnis. During the six months prior to checking himself into the hospital, Stevens admits consuming approximately two fifths of liquor per day.

At the outset, it should be noted that, although Stevens sought at trial to link his headaches and personality change to his tumor by showing that these maladies arose after his 1991 fall, this causal connection was never established. Furthermore, the parties agree that the tumor was not caused by, or otherwise related to, Stevens' employment with McGinnis. Thus, the only evidence that Stevens' problems may have been attributable to the tumor is the testimony of Drs. Poore and Martin, which is speculative in nature.

Both Drs. Martin and Poore admitted that Stevens' tumor could have existed without causing any symptoms, but they opined that, because those problems abated once the tumor

was removed, it is probable that the tumor was the source of Stevens' headaches and personality change.[2] Both doctors admitted that alcohol abuse can also produce headaches and behavioral changes of the type alleged by Stevens. Furthermore, any post-surgery changes in Stevens' condition can plausibly be explained by the fact that Stevens reportedly had attained sobriety at that time. Neither Dr. Poore nor Dr. Martin were aware of Stevens' history of alcoholism at the time of their testimony. I cannot escape the conclusion that any problems experienced by Stevens were clearly the product of his alcohol abuse.

The unquestioned medical expert on the rare condition experienced by Stevens was Dr. Rodney Geier, a board-certified Cincinnati radiation oncologist, who reviewed the hospital records in this case. His opinion was that the symptoms that might be expected from this type of tumor would be "hoarseness . . . some difficulty swallowing, symptoms related to the vagus nerve or the tenth cranial nerve," but not headaches or personality changes. His opinion further was that we would not expect such a tumor to secrete catechloamines, and that any such secretion would not modify Stevens' behavior.

I add a few words about the majority's construction of the doctrine of maintenance and cure. In upholding the award to Stevens, the majority relies on *dicta* from *Vaughan v.*

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[2] Dr. Poore, a family practitioner, did not review the hospital records, and agreed that he would defer to the opinion of specialists, yet he disagreed with the other doctors about the secretion of catecholamines from the tumor.

Atkinson, 369 U.S. 527 (1962). That case, however, is easily distinguishable from the present situation. In *Vaughan*, the seaman plaintiff checked into a hospital only five days after returning from a three month voyage. Additionally, in contrast to the case at bar, it is obvious that the defendant shipowner in *Vaughan* knew, before the end of the voyage (*i.e.*, during the employment relationship), that the plaintiff was ill, because the defendant issued the plaintiff a certificate to receive hospital treatment once the ship docked. *See id.* at 528.

The Supreme Court has stated that the doctrine of maintenance and cure should not be "narrowly confined." See *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 735 (1943). In my opinion, this admonition is not contravened by concluding that maintenance and cure does not apply to an illness, only speculatively and tenuously connected to a seaman's employment, which was first discovered six months after the seaman was terminated due to alcoholism and assaultive behavior. Further, it may be that Stevens waived any claim to maintenance and cure by failing to report the 1991 fall that allegedly activated his tumor and by failing to seek medical attention at any time while in the employ of McGinnis. See *Vella v. Ford Motor Co.*, 421 U.S. 1, 5 n.4 (1975) (leaving open the question of whether "a seaman may forfeit his right to maintenance and cure by not reporting a known injury or malady, or by refusing from the outset to allow proper medical examination, or by discontinuing medical care made available"). In any event, Stevens' condition was not manifest during his McGinnis employment.[3]

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[3] To "manifest," according to Webster's THIRD NEW INTERNATIONAL DICTIONARY, is "to show plainly" or "to make

In sum, I would reverse on the basis that Stevens has not proven that his tumorous condition manifested itself during his employment with McGinnis.

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palpably evident or certain."

APPENDIX C

FILED
JUN 13 1996
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARRELL EDWARD STEVENS,	)	
	)	
Plaintiff-Appellee,	)	
Cross-Appellant,	)	
	)	
v.	)	**ORDER**
	)	
McGINNIS, INC.,	)	
	)	
Defendant-Appellant,	)	
Cross-Appellee.	)	

BEFORE: BROWN, WELLFORD, and MILBURN, Curcuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Wellford would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk /s/